

DISSENT

I dissent in the Commission's decision to adopt the Renewable Energy Standard and Tariff (REST) Rules because:

- The Commission is unclear in its purpose for adopting the Rules.
- The Renewable Energy Standard will not ensure reliable service at reasonable rates.
- The Decision charges Staff with unreasonable responsibilities.
- The cost of the Renewable Energy Standard to the ratepayers is unknown.
- The Rules provide the means to charge whatever it will cost.
- The Commission failed to assess the long-term impact on Arizona's economy.
- The Rules are unfair to the ratepayers.
- The Rules are an improper use of the Commission's police powers.
- Key provisions of the rules are vague or confusing.
- The Rules allow RECs from off-grid systems outside Arizona.
- The Decision disregards statutory rule making process.
- Appendix B is biased.
- The Decision convicts the utilities of unjust service without any basis.
- The Commission lacks authority to enact the Rules.

The Commission's purpose in adopting the Rules is unclear.

In Decision No. 68566, Finding of Fact No. 11 states that:

"The February 3, 2006 Staff Report states that the proposed rules promote the Commission's goals to protect the environment and increase renewable energy resources for diversity of the fuel supply, to enhance system reliability and safety in a post 9/11 era, and to mitigate against volatility in non-renewable fuel prices."

The Commission erred in making this finding because the February 3 Staff Report makes no such statement. While the goals purported to be the Commission's in Finding of Fact No.11 are *discussed* in the Report, the Report does not identify them as being the Commission's goals, nor did the Commission adopt the Report to make Staff's goals its own. In any case, nowhere does the Report state that the proposed rules promote the goals. Finding of Fact No. 11 is demonstrably false, and the fact that the Commission adopted it and Staff subsequently repeated it in the Notice of Proposed Rulemaking (NOPR; Question 5) does not make it true.

Although Decision No. 68566 fails to establish the Commission's reasons for initiating the rulemaking, the proposed Rules specify intent in two places:

R14-2-1804.A states "In order *to ensure reliable electric service at reasonable rates*, each affected utility shall . . . satisfy an annual renewable energy requirement," and

R14-2-1805.A states "In order *to improve system reliability*, each affected utility shall . . . satisfy a distributed renewable energy requirement" (emphases added).

Thus, the Rules indicate that their purpose is to ensure reliable service at reasonable rates. This is consistent with *some* of the goals attributed to the Commission in Finding of Fact No. 11, but the Rules make no mention of the other goals outlined in Finding of Fact No. 11, such as protecting the environment, diversifying the fuel supply, addressing safety concerns in a post 9/11 era and mitigating fuel price volatility. The obvious disparity between the expansive purposes outlined in Finding of Fact No. 11, and the narrow scope of the Commission's purpose as stated in the Rules, belies the Commission's own confusion about its goals.

This confusion is further manifest in the "Economic, Small Business and Consumer Impact Statement" where, in response to question No. 7, Staff states "The Commission is unaware of any less intrusive or less costly methods that exist for achieving the purpose of the proposed rule making." If, as the Rules themselves indicate, the purpose is to ensure reliable electric service at reasonable rates, the Commission should have explained why it did not consider coal and nuclear technologies as means of providing reliable and economical generation.

Utilities subject to the Rules, and the ratepayers who will now bear the cost of compliance, deserve a coherent statement of the objectives the Commission seeks to accomplish with the Rules. Unfortunately, the Commission never provided one.

The Rules will not ensure reliable electric service.

Fuel diversity *is* important to reliable electric generation, and Arizona already has a diverse mix of fuels for generating firm, dispatchable and reliable power, including coal (51%), nuclear (26%), natural gas (13%) and hydro (9%)¹. Renewable energy has the potential to contribute to this diversity, but only a few of the renewable energy sources allowed under the Rules, such as biomass, geothermal and landfill gas, produce firm power.

Renewable resources capable of generating firm power will provide only a miniscule amount of the electricity the utilities will need to comply with the Rules. For the foreseeable future, they will have to meet the overwhelming balance of their obligations to the Rules by producing or buying large amounts of solar and wind power. Solar and wind are intermittent sources capable of generating only non-firm, non-dispatchable, and therefore, *unreliable* power.

Proponents of the Rules argued that the Distributed Renewable Resource Requirement will improve system reliability by lessening strain on conventional generation and other infrastructure by producing power on the customers' premises at peak demand. That argument is wrong because solar power production starts to decline several hours before peak electricity demand during the hottest part of the day, which coincides with cloud cover during the summer thunderstorm season. When clouds block the sun as they often do on a July afternoon, owners of rooftop solar PV systems draw conventional power off the existing infrastructure like everyone else.

¹ <http://www.eia.doe.gov/cneaf/electricity/epa/epat1p1.html> (YTD 5/2006 for electric utilities)

As noted by TEP-UNSE², there is no evidence in the record to substantiate the counter-intuitive claim that an increased reliance on intermittent resources will enhance reliability. More seriously, there is nothing to alleviate Staff's legitimate concerns³ that increased reliance on intermittent resources has the potential to *degrade* reliability when the amount of intermittent power on the western interconnection approaches operating reserve capacity. The Decision's sole response to this system-wide threat to reliability is to order Commission Staff to ensure that the workshop process required under R14-2-1811 "adequately addresses any reliability concerns related to the interconnection of new renewable energy resources with the existing distribution and transmission system." This response is wholly inappropriate and ineffective because workshops hosted by this Commission lack the jurisdictional scope necessary to identify and implement solutions to reliability problems arising from uncoordinated increases in intermittent power throughout the west. Contrary to Finding of Fact No. 242, it is *not* reasonable to order Staff to ensure that any reliability concerns are adequately addressed because that goal is inherently unachievable in workshops.

The Commission's adoption of the REST Rules is in reckless disregard for reliability and places unreasonable responsibilities on Staff.

The Rules will not produce reasonable rates.

The affected utilities will have to rely heavily on 30-year-old solar photovoltaic (PV) technology to comply with the Rules, especially since the Distributed Renewable Energy Requirement is a *de facto* 30 percent solar electric set-aside. Whether used in rooftop systems or in central station applications, current solar PV technology is *the most expensive* renewable technology available to the affected utilities. According to a 2005 report on solar energy by the U.S. Department of Energy, Office of Science, "Solar electricity from photovoltaics is too costly, by factors of 5–10, to compete with fossil derived electricity. . . ."⁴

Manufacturers, distributors and installers of rooftop PV systems claim that the cost of PV will continue to decline to the point where it will soon be economical, if only we will invest in "incentives" to "kick-start" the market. The Office of Science indicates otherwise:

- "If the present learning curve for PV cells is followed, the projected attainment of very-low-cost PV power (\$0.02/kWh) . . . would lie far in the future . . ."⁵
- "Reaching a [PV module price] of \$0.40/W_p sooner will require an intense effort in basic science to produce a technological revolution that leads to new, *as-yet-unknown technology*."⁶ (emphasis added)

² April 18, 2006, Joint comments of TEP and UNSE, Page 7.

³ Comments of Staff Electrical Engineer Jerry Smith at the February 16, 2006 Special Open Meeting.

⁴ Office of Science, U.S.D.O.E. "Basic Research Needs for Solar Energy Utilization: Report on the Basic Energy Sciences Workshop on Solar Energy Utilization." Washington, D.C. April 18-21, 2005, Page 4.

⁵ *Id.*, Page 19.

The cost of PV *has* declined, primarily because of more efficient mounting, but it does not follow that the *rate* of decline will be sufficient to render current PV technology economically self-sustaining anytime soon. In fact, solar PV prices are *increasing* because of growing demand for silicon to supply massively subsidized overseas markets. Effectively requiring 30 percent of the renewable power to come from rooftop solar panels is an extremely wasteful use of ratepayer dollars to subsidize the least economical renewable technology. The Distributed Renewable Energy Requirement is therefore contrary to the Commission's previous finding that the development of renewables should be designed to achieve maximum benefit for the money spent.⁷

Regardless of their location, intermittent resources, such as solar and wind, must be backed up with spinning reserve and baseload generation if service reliability is to be maintained. The cost of this backup infrastructure must be included in the cost of energy that is generated from intermittent resources, just as the costs of reserve power infrastructure are now charged to the power actually sold. Some of the practical constraints and cost effects of intermittent power were recently summarized by the Energy Information Administration⁸ as follows:

- "When the wind is not blowing or the sun is not shining, [wind and solar resources] cannot generate electricity. As a result, . . . additional capacity may have to be added to . . . ensure that consumers' electricity needs can be met at all times".
- "The need to add backup capacity . . . adds system costs that are not reflected in levelized costs."
- "All technologies require some investment to interconnect to the transmission grid, but these costs can be higher for . . . intermittent technologies . . . because of their lower generation."

Given the exorbitant cost of solar PV and costs associated with the intermittent character of the technologies that will be the backbone of the Renewable Energy Standard, the Commission should have considered the results of a careful analysis of the projected cost of the RES to the ratepayers. As indicated in Staff's response to question No. 6 in the NOPR, however, the need for any such study was simply dismissed as "not applicable."

While it lacks any hard data bearing on the future cost of the Rules, Staff's Economic, Small Business and Consumer Impact Statement (Appendix C) offers various estimates of monthly surcharge caps that might yield enough revenue to allow the utilities to comply during the early years of the RES. The companies also provided estimates of their compliance costs, which are dramatically higher than Staff's. This is not at all surprising considering that the utilities have practical experience in producing and buying renewable power and will be the ones to endure the consequences of noncompliance.

⁶ Id., Page 20.

⁷ Arizona Corporation Commission Decision No. 62506. May 4, 2000, Finding of Fact No. 38. Page 25.

⁸ Gruenspecht, Howard, Statement of the Deputy Administrator of the Energy Information Administration before the Subcommittee on Select Revenue Measures, U.S. House of Representatives Committee on Ways and Means. May 24, 2005. Page 8.

Because the Rules require the utilities to annually file a tariff proposing a funding level sufficient for compliance, the Rules are in effect a blank check for the Commission to increase the subsidy, at the ratepayers' expense, to whatever amount the utilities may need to supply the required Renewable Energy Credits (RECs). Nobody knows what the Renewable Energy Standard will cost the ratepayers, but one thing is sure, it will be far more than the \$1.05 per month that is given in the Sample Tariff⁹ as the monthly cap for residential customers. In fact, the Commission's own economic impact statement states that by 2008, the so-called "cap" may need to increase to \$1.40 per month for some companies, and up to \$2.00 per month for others.¹⁰

The Commission had no basis for finding that the cost of subsidizing ever-increasing amounts of uneconomical energy will produce reasonable rates; the Rules are a virtual mandate for imprudence.

The Commission failed to assess the Rules' long term impact on Arizona's economy.

In its analysis of the economic impact of New Jersey's proposed Renewable Portfolio Standard (RPS), Rutgers University concluded that the RPS would have a negligible impact on the growth of the State's economy, *assuming that renewable costs will come down*.¹¹ However, in considering the economic effect of the proposed RPS if the technological improvements are *not* realized, the study concluded:

- "The economic and electricity price impacts of the proposed 20% RPS . . . depend substantially on whether expected technological improvements and other factors occur that reduce the cost of PV and wind power."¹²
- ". . . if additional cost reductions do not exceed the pace of those that have historically occurred . . . the proposed 20% RPS would raise electricity prices by approximately 24% in the year 2020 and have a *measurable, negative impact on the state's economy*."¹³ (emphasis added)

Unlike the New Jersey Board of Public Utilities, this Commission did not order a rigorous and impartial study of the probable impacts of the REST Rules on Arizona's economy. Absent such a study, including a scenario in which PV costs *do not* decline faster than they have in the past, the Commission's adoption of the REST Rules is in reckless disregard for Arizona's economic future.

⁹ Appendix A to Appendix A of the Decision.

¹⁰ Appendix C, Page 7.

¹¹ "Economic Impact of New Jersey's Proposed 20% Renewable Portfolio Standard" Center for Energy, Economic & Environmental Policy, Rutgers University. December 8, 2004. Pages 3 and 4.

¹² Id., Page 4.

¹³ Ibid.

The Rules are unfair to the ratepayers.

As modeled in the Sample Tariff, the monthly surcharge caps are unfair because they benefit customers who use large amounts of electricity, while disadvantaging more conservative, often low-income, customers whose electricity expenses account for a greater proportion of their budget. As an alternative to caps, the Commission should have considered a straight per kWh surcharge without caps, or even an inverted block rate structure in which customers who use less electricity would be rewarded by paying a lower per kWh surcharge than customers who use excessive amounts of power, who would pay a higher amount per kWh to subsidize renewable power.

The Distributed Renewable Energy Requirement is unfair because millions of customers will pay a premium for electricity so that the few hundred of them who want rooftop units, and who are affluent enough to upfront the cost, can enjoy a rebate to offset the otherwise exorbitant price of this most inefficient technology. The Rules also allow ratepayer dollars to subsidize off-grid systems to benefit "customers" who themselves never paid a cent of the RES surcharge because they do not purchase electricity from the affected utilities. The Distributed Requirement is especially unfair to renters and other customers who do not own homes because they will fund the subsidy but be unable to participate in the rebate programs.

The Rules are an improper use of the State's police powers.

Requiring utilities to provide power from customer-owned distributed facilities is a misuse of the Commission's regulatory powers; no matter how large the subsidy, the utilities have no means to compel customer participation, which is essential for compliance. The Commission's Rules are binding only on the utilities and not the ratepayers. Therefore, it is an improper use of the Commission's police powers to impose rules on the utilities in an attempt to influence customer behavior to conform to the Commission's ill-conceived policy objectives.

Key Provisions of the Rules are vague or confusing.

At the October 31, 2006 open meeting, the Commission adopted an amendment that moved the waiver provision in Rule 1815¹⁴ (as published in the NOPR), to an entirely new rule (Rule 1816). In so doing, the Commission added language, which was not in the waiver provision as published in the NOPR, to the effect that a petition for a waiver filed pursuant to [Rule 1816] "shall have priority over other matters" pending before the Commission.¹⁵ Because of its vagueness, the new language establishing "priority over other matters" will be a source of conflict and confusion every time an Affected Utility files a petition.

¹⁴ Appendix A, page 25, lines 7 and 8.

¹⁵ Mundell verbal amendment to Paragraph C of Hatch-Miller Amendment No. 2, adding R14-2-1816.

The definition of "Net Metering" (1801.M) is fatally flawed because it allows the owner of customer-sited generation to be credited not only for excess electricity returned to the grid, but also for the electricity the customer generates and consumes. To correct this flaw, the definition of net metering should have been amended to conform with the definition in the Energy Policy Act of 2005, which provides credit to the distributed generator only for excess power that is returned to the grid.

"Customer" normally means a person who buys goods or services, especially on a regular basis. Thus, in the context of the Distributed Renewable Energy Requirement (Rule 1805), one could reasonably interpret "customer" to mean a person who purchases electricity from an Affected Utility, and whose residence or business must therefore be connected to the grid. The record shows, however, that in addition to its conventional meaning, "customer" in the Rules means any person who consumes electricity.¹⁶ This includes a person who installs an off-grid distributed system whose cost is offset by a subsidy payment from an Affected Utility according to a contract providing that RECs attributable to the system go to the Utility for its use in satisfying Rule 1805. In simple terms, it is the Affected Utility who is purchasing something (RECs), and who is therefore the customer, from the off-grid generator, who is the seller. Because the meaning of "customer" as intended in the Rules is opposite the normal meaning of "customer," the Rules should have included a definition to avoid the confusion that will inevitably befall an average reader.

The Rules allow RECs from distributed systems outside Arizona.

Rule 1805, which requires the Affected Utilities to obtain RECs from Distributed Renewable Energy Resources, contains no requirement that those Resources be located within the Affected Utilities' service territory. Given 1) the absence of such a service area requirement, 2) the possibility that an Arizona "customer" may be a person who enters into a contract with an Affected Utility to supply the Utility with RECs from an off-grid system, and 3) Rule 1803.G, which exempts Distributed Resources from the Utilities' obligation to demonstrate delivery of renewable energy to their retail consumers, there is nothing in the Rules to prohibit an Affected Utility from satisfying its obligations under Rule 1805 by using ratepayer money to buy paper RECs from off-grid distributed systems anywhere in the world.

The Decision disrespects statutory rule making process.

The Decision circumvents statutes that apply to the Commission's rulemaking by 1) incorporating amendments that make substantial changes to the Rules as published in the NOPR without the required notice of supplemental rule making, and 2) by negating changes proposed by the Administrative Law Judge (ALJ) to resolve legitimate issues that were raised in public comments filed in the docket and brought forward in the public comment hearing.

¹⁶ June 26, 2006 letter from Janice Alward to Commissioner Gleason.

Arizona Revised Statutes § 41-1025 lists three criteria that an agency must consider to determine if a change adopted after the rule was published in the NOPR is a substantial change requiring a notice of supplemental rule making under A.R.S. § 41-1022.E. In applying these criteria, it appears the Commission adopted substantial changes, without a notice of supplemental rulemaking, in at least three areas.

First, the Decision changes the wording of Rule 1803 so that it no longer requires the Affected Utilities to deliver “renewable electricity” to their customers. By incorporating the ALJ’s proposed amendment, the Rule requires delivery of “energy from Eligible Renewable Energy Resources to the Affected Utility’s *system*.” (emphasis added). At the February 10 Open Meeting, the Commission debated the appropriateness of the term “renewable electricity” at great length,¹⁷ and at the end of that discussion, no amendment to the language of R14-2-1803 was offered, let alone adopted. The Commission’s adoption of the ALJ’s amendment is a substantive change because requiring delivery of renewable electricity to the customer is not the same as requiring delivery of renewable energy to the system. Therefore, the Commission should have filed a Notice Supplemental Rulemaking, as required by A.R.S. § 41-1022.E.

Second, the Decision incorporates the ALJ’s proposed amendments that changed the Annual Renewable Energy Requirement and Distributed Renewable Energy Requirement (as listed in the schedules in Rules 1804 and 1805) by pro rating the required percentages based on when the Commission approves each utility’s RES funding mechanism. These are substantial changes because they change the percentages that are the core provisions of the REST Rules package. By creating a different percentage requirement for each Affected Utility, the Renewable Energy Standard is no longer standard. Further, because they delay full implementation of the required percentages according to the schedules published in the NOPR, the adopted amendments adversely affect stakeholders seeking relief from the negative effects of conventional generation. Therefore, the Commission should have filed a Notice Supplemental Rulemaking, as required by A.R.S. § 41-1022.E.

Third, under Rule 1815 as published in the NOPR, the Commission could have denied an Affected Utility the ability to recover the costs of making up any deficiency in the number of RECs it was able to obtain, after due process. By incorporating the ALJ’s amendment, however, Rule 1815 now provides that an Affected Utility that fails to meet its annual REC requirements can be denied cost recovery *only if the utility did not comply with the implementation plan* under Rule 1813. Changing the circumstances under which a company can be denied cost recovery is a substantial change, as evidenced by the utilities dropping their opposition to 1815 in light of the ALJ’s suggested amendment. The effect of the rule after the change is to reduce the burden on the Affected Utilities. However, the interests of other stakeholders are harmed because the Affected Utilities have less incentive to obtain the required number of RECs, thereby forestalling the purported beneficial environmental effects of the Renewable Energy Standard. Here again, the Commission should have filed a Notice Supplemental Rulemaking, as required by A.R.S. § 41-1022.E, before adopting the change.

¹⁷ Tr. 124-141

At the October 31, 2006 Open Meeting, the Commission adopted amendments that stripped out many beneficial changes that the ALJ proposed to resolve legitimate issues that were raised in public comments filed in the docket and brought forward in the public comment hearing in response to the NOPR. Useful changes that were rejected include:

- Adding a 100-year water supply requirement in the definition of an eligible “biomass electricity generator.” (1802.A.2)
- Improved method for calculating Renewable Energy Credit (RECs) for solar cooling to provide incentives for more efficient systems. (1803.B and C)
- Adding language expressly allowing the utilities to obtain Commission approval for innovative distributed energy programs developed after their Uniform Credit Purchase Program is first implemented. (1810.C)
- Adding a provision that implementation plans are deemed approved if the Commission does not act on them within 180 days of filing. (1813.C)
- Adding a definition of “appropriate plan” that clearly specifies compliance requirements for the Cooperatives. (1814)

The statutes provide for a supplemental rulemaking process to incorporate substantial changes warranted by public comment, but in its haste to enact the Rules, the Commission rejected that process. By so doing, the Commission wasted the ALJ’s efforts to resolve the substantial issues that came to light through public comment and negated the very purpose of the NOPR. The Commission wrongly discarded the ALJ’s proposed changes *without regard for their merits*.

Similarly, this Decision rejects numerous amendments that were offered at the Open Meeting, including ones that would have:

- Corrected the definition of “net metering” (1801.M) to conform with the Energy Policy Act of 2005.
- Allowed greater flexibility in the kinds of forest thinnings that could be used by biomass electricity generators. (1802.A.2)
- More fairly distributed the cost of the RES by removing the Caps in the Sample Tariff.
- Helped to ensure that distributed resources will not consume a disproportional amount of the RES funding.
- Increased accountability by requiring certain participants to supply a performance bond.
- Enhanced monitoring by requiring a cost/benefit evaluation in five years.
- Given priority to funding renewable projects that produce firm power during peak load.

Just as it was wrong for the Commission to strip the Decision of the ALJ's proposed amendments, so was it wrong for the Commission to reject open meeting amendments with out regard for their merits and solely because they may have been substantial.

Appendix B is biased.

In my April 7, 2006 letter, I asked the parties to address the extent to which the Commission has constitutional and statutory authority to enact the Rules. In the response filed by the Commission's Legal Division,¹⁸ Staff reviewed authorities which could be argued as supporting the Commission's authority to make the Rules, but also reviewed contrary authorities which could be used to argue that the Commission lacks the necessary authority. After reviewing both positions and the conclusions which each might support, Staff declined to offer its own conclusion about whether the Commission does or does not have sufficient authority to enact the Rules.

In summarizing Staff's response, Appendix B¹⁹ presents only one of the two positions discussed by Staff — the one supporting the Commission's authority to enact the Rules — and conveniently omits the contrary arguments. Moreover, Appendix B misrepresents Staff's review of the arguments supporting the Commission's position as if it were Staff's *conclusion* that the Commission has the necessary authority. A comparison between the statement attributed to Staff in Appendix B,²⁰ and the statement actually made by Staff,²¹ will show that Staff offered no conclusion.

The Commission lacks authority to make and enforce the Rules.

In Decision No. 68566, the one and only Conclusion of Law asserts that the Commission has the authority to enact the Renewable Energy Standard and Tariff rules under Article XV of the Arizona Constitution and Title 40 of the Arizona Revised Statutes.²² There are good reasons to doubt that claim.

Article 15, Section 3 of Arizona's constitution provides that the Commission has full power to 1) set the rates charged by the regulated utilities, and 2) to make rules for the convenience, comfort, and safety, and the preservation of the health of the utilities' employees and customers.

Proponents of the REST Rules argue that the second phase gives the Commission constitutional authority to require the use of renewable energy sources for electricity generation to limit environmental impacts otherwise resulting from fossil-fuel generation. In recent years, however, the courts have determined that the Commission has no regulatory authority under Article 15, Section 3 except that connected to its ratemaking power. In so doing, the courts recognize that the Commission's power goes beyond

¹⁸ Janice Alward, April 18, 2006. Pages 1-4.

¹⁹ Appendix B, Page 49 and 50.

²⁰ Appendix B, Page 49, line 7.

²¹ Janice Alward, April 18, 2006. Page 1, line 28 through page 2, line 1.

²² Decision 68566, Page 3, lines 7 and 8.

strictly setting rates and extends to the enactment of rules and regulations that are *reasonably necessary steps to ratemaking*.

The core provisions of the REST Rules are:

R14-2-1804, which dictates that the affected utilities must obtain RECs by supplying specific percentages of power produced using a specified set of technologies according to a specified schedule, and

R14-2-1805, which dictates that, according to a specified schedule, certain percentages of the RECs required under R14-2-1804 must be from distributed generation.

Neither requiring the use of certain generation technologies at specified portfolio percentages, nor dictating the location of generation, is a reasonably necessary step to ratemaking. Thus, the Commission has no constitutional authority to enact R14-2-1804 or R14-2-1805, or any of the other the rules derived from those core provisions.

In the absence of any constitutional authority, the Commission could enact the REST Rules if it had statutory authority to do so. However, the Legislature has not enacted any statute giving the Commission authority to require the use of renewable energy, or otherwise dictate the use of specific fuels or technologies. It could be argued that A.R.S. § 40-321 provides authority for the REST Rules because the Commission has determined that the Rules are the appropriate remedy to the conclusion that the Affected Utilities' service is unjust, unsafe or improper. While this Decision reaches this conclusion in Finding of Fact No. 231, there are no data in the record to support it. Finally, in enacting the REST Rules, the Commission circumvented the Administrative Procedure Act (A.R.S. Title 41, Chapter 6), which requires an agency, including the Commission, to have specific statutory authority over the subject matter of the rules.

The REST Rules impermissibly interfere with the management prerogative of the Affected Utilities. By attempting to regulate the use of specified percentages of certain energy sources and the location or generating facilities for the sake of environmental protection, the Commission has strayed from its proper role in government to assume functions that executive branch agencies have the statutory authority and responsibility to perform.

The Conclusion of Law in Decision No. 68566 is wrong, and the fact that the Commission adopted it as Conclusion of Law No. 1 in this Decision does not make it right. If the Commission wants to impose rules on the Affected Utilities to protect the environment, it should have first gone to the Legislature to secure the requisite authority.


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Commissioner